

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,)	
)	3:07CR154
Plaintiff,)	AUGUST 17, 2009
)	
vs)	
)	
KATHLEEN GIACOBBE (2))	
PORFIRIO ORTA-ROSARIO (3),)	
CHRISTOPHER OTIKO (5),)	
)	
Defendant.)	
	/	

VOLUME VI
MORNING SESSION

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBERT J. CONRAD, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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NUMBER	ADMITTED
31, 32, 33	1154
CERTIFICATE OF REPORTER	1202

1 **P R O C E E D I N G S**

2 (Court called to order at 10:00 a.m. and
3 defendants present in courtroom.)

4 THE COURT: Good morning everyone. I hope
5 everyone had a relaxing weekend.

6 Are we ready for the jury?

7 MR. WASHINGTON: The government is ready.

8 THE COURT: Very well. Call the jury.

9 (Jury enters courtroom at 10:01a.m.)

10 THE COURT: Morning, jury.

11 Is the government ready to call its first witness?

12 MR. WASHINGTON: Yes, thank you, Your Honor. At
13 this time the government calls Dr. Carmen Catizone.

14 THE COURT: I remind the parties about
15 sequestration.

16 MR. ADOLF: Judge, my expert is present in the
17 courtroom pursuant to the rules to watch the other expert
18 witness testify.

19 **CARMEN CATIZONE**

20 being duly sworn, was examined and testified as follows:

21 **DIRECT EXAMINATION**

22 **BY MR. WASHINGTON**

23 Q Good morning, sir.

24 A Good morning.

25 Q Could you please state your full name, spelling your

1 last name for the record.

2 A Carmen Catizone. C-A-T-I-Z-O-N-E.

3 Q Where do you live, sir?

4 A Illinois.

5 Q Sir, what is your profession?

6 A I'll a pharmacist, and the chief executive officer of
7 the National Association of Boards of Pharmacy.

8 Q How long have you been employed by the National
9 Association of Boards of Pharmacy?

10 A For 25 years.

11 Q Can you explain to the jury briefly what that
12 organization does?

13 A The National Association of Boards of Pharmacy is an
14 association whose members are the State Boards of Pharmacy,
15 that regulate pharmacies and pharmacists. Pharmacists
16 cannot join the association. Pharmaceutical companies are
17 not part of the association. We exist to help the states
18 protect the public health.

19 Q What are your duties with there?

20 A As the chief executive officer I oversee all the
21 operations, all the programs and services, and all of the
22 strategic planning and implementation of the association.

23 Q Have you held other positions at the National
24 Association of Board of Pharmacies?

25 A Before being named executive director, I was the test

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1 and measurements director so I oversaw all the examine
2 programs that the association offers to the states.

3 Q Could you describe your formal education to the jury?

4 A I earned my bachelor of science in pharmacy from the
5 University of Illinois, and I also earned a master's degree
6 in pharmacy administration and health care policy from the
7 University of Illinois.

8 Q Do you hold any professional licenses?

9 A I'm currently licensed in the state of Illinois.

10 Q And have you worked previously as a practicing
11 pharmacist?

12 A I have worked both in the community setting and a chain
13 pharmacy, as well as in a hospital pharmacy.

14 Q Do you have any particular expertise in the area of
15 online pharmacies?

16 A I have been involved with the regulation and practice
17 of Internet pharmacies since 1995, when we first began to
18 research this practice area.

19 Q Have you testified previously as an expert?

20 A Yes, sir.

21 Q Have you testified before State Boards of Pharmacy?

22 A I've appeared before all the State Boards of Pharmacy
23 with the exception of Alaska.

24 Q Have you testified in state court?

25 A I have provided information and appeared in state court

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1 as well.

2 Q Have you testified in federal court as an expert?

3 A Yes, sir.

4 Q Have you ever had the opportunity to testify before
5 Congress or the Senate?

6 A Yes, sir.

7 Q How frequently have you done that?

8 A When the Internet pharmacies were a topic of Congress
9 and the Senate, I probably testified three, four times per
10 year before the various senate committees and house
11 committees, and even a panel of governors that were holding
12 hearings on Internet pharmacy. Presently I testify maybe
13 once or twice a year before those committees.

14 Q Have you appeared on radio and TV to discuss online
15 pharmacies?

16 A Yes, sir.

17 MR. WASHINGTON: Your Honor, at this time we'd
18 offer the witness, Carmen Catizone, as an expert in the area
19 of pharmacy practice and pharmacy regulation.

20 THE COURT: Any objection?

21 MR. ADOLF: Your Honor, may I have voir dire very
22 briefly?

23 THE COURT: Very briefly.

24 **VOIR DIRE EXAMINATION**

25 **BY MR. ADOLF**

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1 Q Is it Dr. Catizone?

2 A The "doctor" designation is from the State of Oklahoma
3 that awarded me that designation. It's either doctor or
4 mister.

5 Q Okay. You said you have a bachelor's in science
6 pharmacy and a master's degree in a pharmacy-related field?

7 A Pharmacy administration and health care policies, sir.

8 Q But as far as the doctorate, that's an honorary
9 doctorate?

10 A It's a designation the state awards the pharmacists
11 that are licensed to practice in Oklahoma.

12 Q So any pharmacist licensed in Oklahoma would be a
13 doctor of pharmacy?

14 THE WITNESS: Yes, sir.

15 MR. ADOLF: Nothing further, Your Honor. Thank
16 you.

17 THE COURT: This witness will be allowed to render
18 an opinion in the area of pharmacy regulations.

19 MR. WASHINGTON: Thank you, Your Honor.

20 **BY MR. WASHINGTON**

21 Q Are there separate standards of practice for Internet
22 versus brick-and-mortar pharmacies?

23 A The basic legal requirement for a pharmacy to practice
24 and a pharmacist to practice are the same between a
25 traditional brick-and-mortar pharmacy and an Internet

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1 pharmacy.

2 Internet pharmacies have some special distinctions:
3 How they accept prescriptions, how they process those
4 prescriptions, and how they delivery those prescriptions.
5 But those regulations conform, and are in compliance or
6 equivalent to the same regulations in a traditional
7 brick-and-mortar pharmacy.

8 Q So what are some of the unique concerns that relate to
9 Internet-based pharmacy practices versus brick and mortar?

10 A With a regular pharmacy, so to speak, a patient would
11 actually come in and deliver that prescription to the
12 pharmacist or technician. With an Internet pharmacy, those
13 prescriptions are delivered online or through fax, so there
14 has to be extra security provisions to validate that
15 prescription, that relationship.

16 Also with the usual pharmacy, or brick and mortar, the
17 patient actually, or the caregiver, picks up that medication
18 at the pharmacy. With the Internet pharmacy, that
19 medication may be mailed or delivered to the patient.

20 Q Is the NABP involved in initiates to address these
21 unique concerns?

22 A Yes, we are.

23 In 1997 we launched a program called Verified Internet
24 Pharmacy Practice Site Program whereby we designated sites
25 that we considered to be operating in compliance with state

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1 and federal laws, and a set of criteria that we developed in
2 association with the Food and Drug Administration, the Drug
3 Enforcement Agency, consumer groups, and other stakeholders
4 and to distinguish those pharmacies from sites we considered
5 rogue sites, or sites that may be violating federal or state
6 laws or were not in compliance with our criteria.

7 Q So what's a rogue site?

8 A A rogue site is a site that upon us researching that
9 site we have made a determination they are not in compliance
10 with state or federal laws, or have not adhered to the
11 criteria that we have set forth for accreditation.

12 Q So are there legitimate Internet-based pharmacies?

13 A Yes, there are.

14 Q And about -- and are they in the this VIPPS program?

15 A Some are in the VIPPS program, some are not.

16 We have 15 pharmacies representing 12- to 18,000
17 pharmacies across the United States that are accredited.

18 Another program that we offer is the Internet Drug
19 Outlet Identification Service whereby we search the Internet
20 actively for Internet sites, and separate out between those
21 sites again that we feel may be operating out of compliance
22 with state and federal laws.

23 And we have found that 94 percent of those Internet
24 sites are rogue sites or may be operating illegally, and so
25 there's another 6 percent of legitimately operating Internet

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1 sites.

2 Q Could you identify for the jury some of the legitimate
3 Internet sites that members of the public might be aware of?

4 MR. FOSTER: Objection. Irrelevant.

5 THE COURT: Overruled.

6 A Some of the sites that are accredited are CVS,
7 Walgreens, drugstore.com, Medco Prescription Services.

8 Q And what are the qualifications or requirements for
9 them to be accredited through the VIPPS program?

10 A The first and primary requirement is that they must be
11 in compliance with all state and federal laws.

12 We verify that they are in licensed in all the states
13 which they are dispensing medication; that they have all the
14 processes and procedures in place to be in compliance, and
15 then we verify that they are adhering to the criteria that
16 we have established for the program.

17 If a pharmacy meets that first hurdle, we physically
18 inspect every aspect of that pharmacy. So if it has a
19 website, we will travel to the website and inspect their
20 operations. If they have a distribution center, we will
21 inspect the distribution center. If they have pharmacies
22 that are distributing as part of that network, we will
23 physically inspect that to make sure that what they are
24 doing is exactly what they have said.

25 Q With the online-based sites, is it important that they

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1 verify the identity of the customers?

2 A It's a requirement under state law that that identity
3 be verified in one of our criteria.

4 Q And do they ensure that a doctor/patient relationship
5 exists?

6 A Once again, it's a requirement that that relationship
7 be valid, and that the pharmacist verify that relationship.

8 Q Do they ensure that they are valid prescriptions?

9 A Yes.

10 Q Now, what steps are taken within these acceptable sites
11 in verifying the identity of providers?

12 A Through our verification process we verify that the
13 pharmacy has a process in place whereby they'll verify the
14 patient identity from a government-issued identification or
15 through direct contact with the doctor writing the
16 medication, or through some other acceptable means where
17 they then document that the patient is who they say they
18 are.

19 The site must also verify that the doctor issuing those
20 prescriptions is licensed to practice in those states; that
21 the doctor has a valid relationship with that patient, and
22 that prescription is appropriate for that patient.

23 It must be used to treat the disease and condition they
24 have. So if the medication is the wrong medication and
25 would harm the patient, the pharmacist has the

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1 responsibility to call that doctor and have that
2 prescription fixed.

3 And similarly, if the prescription is being used for
4 fraud or abuse or diversion, the pharmacist has the legal
5 responsibility to verify that; and if that's the case, to
6 not dispense the prescription.

7 Q Do pharmacists have an obligation to verify a
8 doctor/patient relationship?

9 A Yes, sir.

10 Q What goes into that?

11 A With the traditional brick and mortar, there's usually
12 a relationship between the pharmacy and the doctors and
13 patients so that relationship is validated.

14 With the Internet pharmacies that have been accredited
15 by our organization, there has to be processes in place
16 where the pharmacy contacts the doctor and validates that
17 relationship, and also validates that the doctor is licensed
18 to practice and is operating within their scope of practice.

19 Q Is there a requirement for a face-to-face meeting?

20 A Our definition and the definition of the State Medical
21 Practice Acts is that a valid doctor/patient relationship
22 has to involve a face-to-face examination.

23 Q Now, what does a prescription require to be valid?

24 A For a prescription to be valid, as I mentioned earlier,
25 it has to be appropriate for the disease and condition. So

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1 if a person has diabetes, that prescription has to be for
2 diabetes; it can't be nor high blood pressure or something
3 else, otherwise it could harm the patient.

4 The prescription has to be based on that valid
5 doctor/patient relationship. Again, the doctor and patient
6 have to be in conversation, there has to be a physical
7 examination and the patient should understand what that
8 treatment is for; and the prescription must not violate any
9 state or federal laws in order for it to be valid as well.

10 Q Can it be faxed?

11 A Controlled substances, except for the Schedule IIs,
12 which are very addictive medications, such as Demerol and
13 other products, can be faxed, as well as non-controlled
14 substances; prescriptions or diabetes, high blood pressure,
15 those types of medications.

16 Q Does it have to be signed?

17 A Noncontrolled substances don't have -- they have to be
18 signed, but those signatures can also be faxed.

19 Controlled substance prescriptions, the doctor has to
20 physically sign that prescription in the presence of the
21 patients when that prescription is being dispensed.

22 Q So for Schedule III and IV controlled substances, can
23 the prescription be unsigned?

24 A No.

25 Q Can it be presigned?

CATIZONE - DIRECT

1 MR. ADOLF: Objection to misstating the law and
2 testifying to the law.

3 THE COURT: Overruled.

4 THE WITNESS: Could you repeat that?

5 Q For Schedule III and IV, can it be presigned or signed
6 ahead of time?

7 A No.

8 MR. FOSTER: I object. I would like to approach
9 sidebar at this time.

10 THE COURT: Very well.

11 (Sidebar conference reported as follows:)

12 MR. FOSTER: Your Honor, the basis of my objection
13 is this is far afield from the basis of his expertise. It
14 sounds like he's testifying as to what the law requires,
15 which means he's going to end up giving an opinion on
16 everything. It has to be done a certain way. In other
17 words, he's invading the province of the jury testifying as
18 to what the law is.

19 MR. ADOLF: He was qualified specifically as an
20 expert on online pharmacies. We haven't heard anything
21 related to other than the victims program.

22 THE COURT: He's qualified as an expert in
23 pharmacy regulation. What's the government's response?

24 MR. WASHINGTON: Your Honor, he's a pharmacist and
25 part of what a pharmacist does is fill prescriptions. And

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1 in order to determine whether or not it's a valid
2 prescription, he has to know the basic -- whether it has to
3 be signed or whether it can be signed ahead of time. That's
4 squarely within the scope of what a pharmacist does. And he
5 was qualified as a pharmacist.

6 MR. FOSTER: It sounds like he's testifying as to
7 what the law requires as opposed to what pharmacy practice
8 is supposed to be. I mean --

9 MR. ADOLF: I would point out my earlier objection
10 to his testifying at all. He's testifying to the exact same
11 things that the doctor testified to but from an pharmacist's
12 perspective, which is the same, and there's no pharmacist on
13 trial, so I don't know why he's testifying to all of that.

14 MR. WASHINGTON: The conspiracy involved first of
15 all a pharmacist.

16 Secondly, through cross-examination, counsel has
17 argued with other witnesses that this is, in fact, an a
18 online pharmacy refill service. That was exactly the
19 questions brought out by counsel, so he should be able to
20 respond to that.

21 THE COURT: I'm going to overrule the objection.
22 I think he's qualified in the area of pharmacy regulation,
23 and he's entitled to testify as to the -- his opinion as to
24 the validness of the procedure at issue in this case. So
25 I'm going to overrule the objections.

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1 MR. WASHINGTON: Thank you, Judge.

2 (Sidebar conference concluded.)

3 **BY MR. WASHINGTON**

4 Q Sir, the question was: Based upon your training and
5 experience can a prescription be for a Schedule III drug to
6 be presigned?

7 A No.

8 Q When does it need to be signed?

9 A It has to be signed when the doctor issues that
10 prescription in the presence or with the patient.

11 Q Are prescriptions valid simply based upon the fact they
12 are issued by someone with a DEA license?

13 A No, sir.

14 Q Now, can you explain how the online-based pharmacies go
15 about filling scripts, the legitimate ones that you have
16 testified about?

17 A For the sites that we've actually reviewed and
18 accredited, they will receive either a prescription directly
19 from the doctor or the doctor's office; they will take that
20 prescription then and validate that prescription with the
21 doctor in the doctor's office insuring that there was a
22 valid patient/prescriber relationship.

23 We do not allow any prescriptions to come directly from
24 the patient or any medical records that come from the
25 patient; everything is done directly with the doctor. The

CATIZONE - DIRECT

1 online site must also verify that doctor again is licensed
2 to prescribe and dispense within their state, and that the
3 doctor is acting within their scope of practice.

4 Q Do any of these sites generate a new script or new
5 prescription?

6 A Of all the sites that I visited, and also the other
7 pharmacies that I'm aware of, the traditional brick and
8 mortar, no pharmacy generates a prescription. The
9 prescription always comes from the doctor, having that valid
10 relationship with the patient. Any of the sites that
11 generate their own prescriptions would not meet our
12 criteria.

13 Q I'd like to show you what's been marked and previously
14 admitted as Government's Exhibit 4A. It should appear on
15 the screen in the front of you. And you have seen this memo
16 prior to testifying in court today?

17 A There's nothing on my screen. Oh, yes.
18 Yes, I have seen this.

19 Q Based upon your training and experience as a
20 pharmacist, is it a typical or acceptable practice to have a
21 memo such as this being held by the pharmacy?

22 A No.

23 Q Why not?

24 A The first part of the memo, which indicates that those
25 prescriptions will be presigned, if it is for a controlled

CATIZONE - DIRECT

1 substances, it's in violation of federal and state law and
2 that is not allowed.

3 MR. FOSTER: Objection. Lack of foundation.
4 Motion to strike.

5 THE COURT: Overruled.

6 **BY MR. WASHINGTON**

7 Q How about the second portion?

8 A In some cases doctors will designate or delegate
9 authority for individuals within their practice to provide
10 information, but this waiver provides far-reaching
11 authority, and actually allows these individuals, in my
12 opinion, to engage in the practice of medicine, and it's not
13 something I've seen with our Internet pharmacies or
14 traditional brick and mortar pharmacies.

15 MR. ADOLF: Objection to that answer, being beyond
16 the expertise, Your Honor, and move to strike.

17 THE COURT: Overruled.

18 **BY MR. WASHINGTON**

19 Q I'd like to next show you what's been marked as
20 Government's Exhibit 35B.

21 Based upon your training and experience as a
22 pharmacist, is this mix of narcotics distributed consistent
23 with typical pharmacy practice?

24 A No.

25 MR. FOSTER: Objection. Irrelevant.

CATIZONE - DIRECT

1 THE COURT: Overruled.

2 Q Go ahead.

3 A No, sir. There are two sources of information that I
4 can base that upon:

5 One: based upon our review of Internet pharmacies and
6 brick-and-mortar pharmacies, the usual mix of prescriptions
7 that a pharmacy would dispense would include medications for
8 high blood pressure, antibiotics, diabetes; the unusual
9 typical diseases or symptoms that people would present to a
10 pharmacy.

11 In this case the overabundance of controlled substances
12 and the limited number of medications becomes a red flag for
13 us, and is far outside of the scope of any pharmacy that
14 we've reviewed, or any of the brick-and-mortar pharmacies
15 that we've seen.

16 The second source is information published by the
17 National Association of Chain of Drugstore and IMS
18 Information Services lists that the average pharmacist --
19 pharmacy across the country dispenses between 12 and
20 15 percent of their total prescriptions are controlled
21 substances.

22 If you look at this chart, it's quite the opposite.
23 Some 90-some percent or 80-some percent of their
24 distribution is controlled substances, which is the exact
25 opposite of what we've seen for traditional brick-and-mortar

CATIZONE - DIRECT

1 pharmacies and our Internet pharmacies, and the data that
2 exists for pharmacies across the country.

3 MR. WASHINGTON: Could I see 35C? Could you show
4 35C to the witness.

5 Q Can you see 35C?

6 A Yes, sir.

7 Q And does the information contained within 35C, is that
8 consistent with what you see in a legitimate pharmacy
9 practice?

10 A No, sir.

11 Q Why not?

12 A Again, the overabundance of controlled substances,
13 particularly this limited number of controlled substances,
14 the hydrocodone is annexed, the carisoprodol. That
15 proportion, that quantity we would not see, I have not seen
16 in the traditional brick-and-mortar pharmacy or our Internet
17 pharmacy.

18 Q And Government's Exhibit 35D. This shows a number of
19 refills showing that 95 percent receive -- of hydrocodone,
20 shows three refills; 94 percent for benzodiazepine; and 95
21 percent for carisoprodol. What is that, carisoprodol?

22 A Some people may know it more as Soma. Soma is the
23 brand name. It's a muscle relaxant.

24 Based upon, again, the literature, that product is
25 something that is used to extend the effects of the

CATIZONE - DIRECT

1 hydrocodone and others. It's also used in combinations with
2 other products to create a heroin-like high for people that
3 abuse prescription drugs.

4 Q Could I show the witness 12G. Can we go to the next
5 page; next, next. There we go. Back please. That page.

6 Have you reviewed this waiver?

7 A Yes, sir.

8 Q Based upon your training and experience, are these tips
9 of waivers consistent with legitimate pharmacy practice?

10 A No, sir.

11 Q Why not?

12 A This is another one of the red flags that we identify
13 when we separate rogue pharmacies from legitimately
14 operating pharmacies.

15 I'm not aware of any pharmacy in the United States,
16 brick and mortar, where a patient walks into that pharmacy
17 and before that pharmacist will dispense the medication, the
18 pharmacy asked that patient to sign a waiver which says that
19 the pharmacy is not responsible for any of the legal aspects
20 or any of the liability for dispensing that prescription.

21 These are the types of things that we've seen with
22 rogue pharmacies that we have identified and not awarded
23 accreditation to.

24 MR. ADOLF: Objection. Move to strike. This has
25 nothing to do with the pharmacy.

CATIZONE - DIRECT

1 THE COURT: Overruled.

2 **BY MR. WASHINGTON**

3 Q Was the Woody Pharmacy or youronlinedoctor.com
4 currently or ever registered as an accredited VIPP site?

5 A No.

6 MR. FOSTER: Objection. Irrelevant.

7 THE COURT: Overruled.

8 A No, sir.

9 Q Would this site, Your Online Doctor, qualify?

10 A No, sir.

11 MR. FOSTER: Objection. Irrelevant.

12 THE COURT: Overruled.

13 Q Why not?

14 A Based upon my review of the operations, the lack of a
15 valid doctor/patient relationship, the mix of prescription
16 products which specialize only in the hydrocodone and other
17 controlled substances, the fact that the doctors were
18 located in one state and prescribing medications for
19 patients across the United States without a valid
20 relationship, those are the primary reasons that it would
21 not meet our accreditation.

22 Q And based upon your training and experience, do you
23 have an opinion as to whether this site operated within the
24 acceptable scope of pharmacy practice?

25 A Based upon my opinion, no.

CATIZONE - DIRECT

1 MR. WASHINGTON: Thank you, sir very much.

2 THE COURT: Mr. Gsell, cross.

3 MR. GSELL: Briefly, Your Honor.

4 CROSS EXAMINATION

5 BY MR. GSELL

6 Q Good morning, Dr. Catizone. My name is Scott Gsell. I
7 represent Kathy Giacobbe. She owned Your Online Doctor.

8 Your understanding is that Your Online Doctor was an
9 Internet website. Correct?

10 A Yes, sir.

11 Q Okay. And to the best of your knowledge, they didn't
12 store any prescription medicine at that location?

13 A No, sir.

14 Q And to the best of your knowledge, it was not a retail
15 pharmacy. Correct? Well -- strike that.

16 Do you know where Your Online Doctor was located?

17 A Yes, sir.

18 Q Where was that?

19 A Vermont.

20 Q Okay did you have a chance to go out and view that
21 location personally?

22 A No, sir.

23 Q Based on your investigation, you don't have any
24 information that Your Online Doctor was a walk-in pharmacy,
25 brick-and-mortar pharmacy as you call it. Correct?

CATIZONE - CROSS

1 A Correct.

2 Q To the best of your knowledge, they didn't store any
3 medication in that location in Vermont. Correct?

4 A Correct.

5 Q All of the prescription medications, based upon your
6 review, were issued from the two Woody's Pharmacy's here in
7 North Carolina. Correct?

8 A Were dispensed, yes, sir.

9 MR. GSELL: Okay. I have no further questions,
10 Your Honor. Thank you.

11 THE COURT: Mr. Adolf, Tate.

12 CROSS EXAMINATION

13 BY MR. ADOLF

14 Q Mr. Catizone, my name is Peter Adolf. I'm here
15 representing Dr. Orta. I'm going to ask you a few
16 questions. If there's anything I ask you that's confusing,
17 doesn't make sense, let me know and I'll try to straighten
18 that out. Okay?

19 A Yes, sir.

20 Q You talked about this VIPPS program that your
21 organization runs.

22 A Yes, sir.

23 Q Is that required that anybody sign up for that?

24 A It's required by four states and recognized by 12 other
25 states.

CATIZONE - CROSS

1 Q So for the vast majority of the country, it's fair to
2 say there's no requirement that anybody sign up with your
3 organization. Right?

4 A Yes, sir. Correct.

5 Q So all of the standards and so forth that you were
6 talking about that you require in totality are optional?

7 A Except for the compliance with state and federal law,
8 yes, sir.

9 Q Right. And you said that, you told us that there are
10 hundreds, perhaps thousands of Internet pharmacies or
11 pharmacies that do business over the Internet and so forth
12 in the country and around the world. Right?

13 A Yes, sir.

14 Q And your organization has been offering this
15 certification now for -- is it ten years, 15 years?

16 A Since 1999. Ten years.

17 Q And in that time, 15 pharmacies and pharmacy chains
18 have signed up for that?

19 A Yes, sir.

20 Q Is it fair to say that a tiny drop in the bucket of the
21 world of pharmacies that could be eligible for that
22 certification?

23 A It's a small percentage, sir, yes.

24 Q One reason for that is because of the fees your
25 organization charges for that. Right?

CATIZONE - CROSS

1 A No, sir.

2 Q Isn't it \$1,000 a year or thereabouts to get that
3 certification?

4 A Yes, sir.

5 Q For a certification that for most is totally optional?

6 A Yes, sir.

7 Q Indeed, for most of them, the only draw for signing up
8 for your organization's certification is a marketing device.
9 Right?

10 A No, sir.

11 Q It's a Good Housekeeping Seal of Approval, if you will?

12 A Yes, sir.

13 Q And that's something they market to their customers.
14 Right?

15 A It's a symbol that they say -- says they are operating
16 legally, as well as in the states where it's required, they
17 must achieve our accreditation.

18 Q And the organizations that have signed up for it by and
19 large are large national chains who cover all of their
20 pharmacy operations was a single fee. Right?

21 A Yes, sir.

22 Q Whereas a local pharmacy, mom-and-pop-type pharmacy,
23 would have to pay your organization the same amount as
24 Walgreens nationally has to pay them for that certification.
25 Right?

CATIZONE - CROSS

1 A No, sir. The fee is different for a multioperational
2 pharmacy. It's \$1,000 for a single pharmacy; and then
3 \$5,000 for multioperation pharmacy.

4 Q So a small mom and pop local pharmacy that wanted to
5 get your certification would be paying \$1,000 year for that
6 privilege. Right?

7 A \$1,000 the first year and then it's \$300 after that.

8 Q Whereas, Walgreens could split -- can divide that fee
9 or can pay for that fee out of the proceeds of all of its
10 pharmacies nationwide and worldwide. Right?

11 A That would be a Walgreens question how they finance it,
12 but ...

13 Q But there are a lot -- you say it's \$5,000 a year that
14 you charge the entire Walgreens organization for that.
15 Right?

16 A Yes, sir.

17 Q A drop in the bucket for them. Right?

18 A I couldn't know, sir.

19 Q You used the term "rogue pharmacy" a bunch of times.
20 Is that term described in law anywhere?

21 A No, sir.

22 Q Is that term described in state regulation anywhere?

23 A No, sir.

24 Q That's just a term you use to divide in your mind
25 pharmacies that are legitimate and for those that are

CATIZONE - CROSS

1 illegitimate?

2 A In our organization, yes, sir.

3 Q And your organization is a private organization.

4 Right?

5 A Yes.

6 Q That charges a fee to its members for its services.

7 Right?

8 A We charge each state \$250 a year for all the services
9 we provide.

10 Q Now, is it fair to say that hydrocodone is the most
11 commonly prescribed prescription medicine in America?

12 A The latest survey I saw from Drug Topics, which is a
13 trade journal, indicated it was the most prescribed and the
14 most abused.

15 Q I don't know if that answered my question exactly. But
16 it is the most prescribed drug in America. Right?

17 A Yes, sir.

18 Q So I guess if drugs were going to be abused, the most
19 commonly used also may very well be the most commonly abused
20 just because there are so many more people using them?

21 A Not true, sir. The last time the survey was done, the
22 antibiotic, amoxicillin, was the most commonly prescribed,
23 and again hydrocodone was the most commonly abused at that
24 time.

25 Q But there have been a number of years -- hydrocodone is

CATIZONE - CROSS

1 routinely over say the last ten years, in many of those
2 years has been the most prescribed drug in America?

3 A I've only seen it within the last year, sir.

4 Q Now, you told us earlier that in your opinion a
5 prescription is invalid if it is not the product of a doctor
6 having seen a patient face to face.

7 A Yes, sir.

8 Q Is that written in law anywhere?

9 A Yes, sir.

10 Q Where is that?

11 A It's in the Medical Practice Acts of all the states
12 that I reviewed, including South Carolina, North Carolina,
13 and a number of other states where it specifically says
14 there must be a face-to-face examination. Online
15 consultations are not a valid relationship.

16 Q You'll 50 states have that law?

17 A I would say 48 of the 50.

18 Q And when were those laws passed?

19 A Some of them -- the North Carolina law was passed in
20 1999; the South Carolina law in 2000.

21 Q And other 48?

22 A The other states vary from 1999 forward, and I don't
23 know the exact date, sir.

24 Q Right. And in the years 2002 to 2006 there were
25 certainly plenty of states that had no written law -- what

CATIZONE - CROSS

1 we're discussing here is law, a statute -- there were
2 certainly plenty of states that had no statutes prohibiting
3 prescribing without face-to-face contact. Correct?

4 A The laws interpretation that the boards at the time had
5 rendered and the standards of care indicated that a
6 face-to-face examination was necessary for a valid
7 relationship. What the states have done is to codify that
8 specifically to avoid people trying to exploit the loopholes
9 that they think exist.

10 Q By "loophole" you mean something was not illegal and
11 they made it illegal?

12 A No. I think people tried to make something legal that
13 was illegal, and the courts are saying that that wasn't the
14 case.

15 Q Okay. I think we need to unpack that answer of yours a
16 little bit.

17 You were talking about something being illegal.

18 A Yes, sir.

19 Q Sir, when you say "illegal," apparently from what you
20 told me in your last answer you mean anything that violates
21 federal law?

22 A Yes, sir.

23 Q Or state law?

24 A Yes, sir.

25 Q Or anything that violates a medical ethics board's

CATIZONE - CROSS

1 guidelines?

2 A No, sir. Medical Standards of Practice.

3 All the Medical Practice Acts say that the activities
4 of the doctor must also meet the standards of care; and,
5 therefore, they are involved in unprofessional conduct or
6 they violated the standards of care.

7 Q All right. I guess what I need to do is try to go back
8 to my earlier question.

9 Was it written down anywhere in all of these states a
10 doctor may not prescribe a -- may not issue a prescription
11 without seeing the patient face to face in person?

12 A I can't say that for every state, but I can say the
13 states that I reviewed in the majority of states had that
14 language in their Medical Practice Acts beginning from 1999
15 forward, but I can't testify to a specific state at this
16 point beyond the ones I mentioned.

17 Q Now, and you mentioned federal law also?

18 A Yes, sir.

19 Q Now, you're aware there was nothing about that in
20 federal law before last year, was there?

21 A Yes, sir, there was.

22 What federal law does, it sets the basis. It says
23 there must be a valid prescription and there must be a valid
24 relationship. And then federal law defers to the states to
25 regulate this. And the State Practice Acts, as I mentioned

CATIZONE - CROSS

1 earlier, did contain language that reference what a valid
2 relationship would be.

3 Q But the federal law didn't say that anywhere, did it?

4 A It didn't specifically say what that relationship
5 needed to be. It deferred to the states.

6 Q Sir, you spent ten years testifying in front of
7 Congress repeatedly to try to get Congress to pass a law
8 saying that physicians should not be allowed to write
9 prescriptions unless they see someone in person face to
10 face. Did you not?

11 A No.

12 Q Did you testify in 2004 in support of a law -- to try
13 to get a law like that passed?

14 A No. What I testified for was Internet regulation.

15 There was a specific bill that they asked us to comment
16 on. And we provided comments about that bill, but we have
17 never testified in favor of a law or lobby. We simply
18 provided information to Congress and the Senate when
19 requested.

20 Q Well, you testified in 2003 before the Committee on
21 Government Reform. Do you recall doing that?

22 A Yes, sir.

23 Q And the bill that was introduced as a result of that,
24 the Internet Pharmacy Consumer Protection Act, included a
25 provision saying that a physician could only prescribe after

CATIZONE - CROSS

1 seeing a patient face to face. Right?

2 A Yes, sir.

3 Q And that was something you support?

4 A Yes, sir.

5 Q Just as you do today?

6 A Yes, sir.

7 Q And you believe that would be a positive step to do
8 that. Right?

9 A Yes, sir.

10 Q And that's because federal law applies everywhere.
11 Right?

12 A Yes.

13 Q Whereas individual state laws apply one place but not
14 only places. Right?

15 A Yes, sir.

16 Q Under federal law, if a law is passed, and it makes
17 something illegal in one state, it's going to be illegal
18 everywhere under federal law. Right?

19 A Yes, sir.

20 Q On the other hand, if something is legal in one state
21 under federal law, that means it's legal everywhere under
22 federal law?

23 A No, sir. The way the law works is the more stringent
24 of the law takes precedent. So if federal law allows
25 something, but a state makes it more stringent and doesn't

CATIZONE - CROSS

1 allow it, the more stringent law prevails.

2 Q Maybe my question wasn't clear enough.

3 What you were testifying to is about federal law, state
4 law, medical practice boards, ethics guideline. I want to
5 restrict you to federal law, was what you were discussing
6 earlier when you talked about a legitimate medical practice.

7 Correct? Federal law?

8 A It's as combination of federal and state. You can't
9 look at one or the other, sir, without looking at both.

10 Q Well, just look at federal law for a moment.

11 Is it your position that if anything is illegal under
12 state law, that makes it illegal in that state under federal
13 law, even if it's permitted somewhere else?

14 A No, sir. I think you're confusing the basics of the
15 law, and I apologize for -- it's not that it's illegal
16 federally; it's illegal based upon the state law. And so
17 that activity is not allowed in that state.

18 It's the more stringent law whether it's federal or
19 state that takes precedent. As an example, under federal
20 law some products are scheduled in Schedule III, and
21 throughout the country any state then would dispense that
22 without the requirements of it being more stringent. In
23 other states that same product may be scheduled much higher
24 than Schedule II and therefore there are special state
25 requirements that supersede that federal law and make it

CATIZONE - CROSS

1 more stringent.

2 Q I understand that in every state there's a whole bunch
3 of different guidelines and laws that doctors have to
4 follow. Right?

5 A Yes, sir.

6 Q But federal law is the same in every state, is it not?

7 A Yes, sir.

8 Q So if something is permitted under federal law in one
9 state, then it is permitted under federal law in all states?

10 MR. WASHINGTON: Objection to these legal
11 conclusions that he's being asked.

12 THE COURT: Overruled.

13 A Again, sir, that's not correct. Just because federal
14 law allows it doesn't mean it would be legal if a state
15 passed a more stringent law saying that it was not legal.

16 Q Now, you said that you had been testifying in front of
17 Congress you testified how many times in the last ten years?

18 A Maybe 20, 30 times, sir. I can't recall exactly.

19 Q And at long last, last year, with your support, a
20 federal law was passed that said, in plain English, that a
21 doctor cannot prescribe medication for somebody if it's
22 related to an Internet practice unless they see the person
23 face to face. Are you familiar with the law I'm talking
24 about?

25 A If you're referring to the Ryan Haight Act, yes, sir.

CATIZONE - CROSS

1 Q Right. And what that did was before that passed, the
2 federal law said that a prescription has to be written
3 pursuant to -- for a legitimate medical purpose, which is
4 what you were testifying about earlier, in the course of the
5 physician's usual medical practice. Right?

6 A Yes, sir.

7 Q After that law passed last year, now it says that's a
8 requirement, and there also has to be an in-person physical
9 examination by the physician. Isn't that what the law
10 changed said?

11 A What the law did is it took what was existing in state
12 law, that requirement of a face-to-face physical
13 examination, and now placed it in federal law. So now it's
14 a requirement for just controlled substances, federally and
15 state. It didn't remove the stated requirement, it didn't
16 create a requirement, it simply moved a state requirement to
17 the federal requirement.

18 Q And from your perspective, you saw that as advantageous
19 because now that means the law is the same everywhere.
20 Right?

21 A It helped, yes, sir.

22 Q Because before individual states would do individual
23 things as far as their laws, their regulations, their ethics
24 guidelines, but the federal bottom line did not include any
25 statutory language about requiring a face-to-face physical

CATIZONE - CROSS

1 examination before issuing a prescription. Correct?

2 A It went right back to your earlier question. Federal
3 law said here was a legitimate -- and the state passed more
4 stringent requirements that said a face-to-face was
5 required, and it varied from state to state. So this
6 codified it across the board. So your question earlier:
7 Can it be legal federally and illegal in the states? That's
8 exactly what happened. They made it now illegal across the
9 board.

10 Q Whereas before it was determined on a state-by-state
11 basis?

12 A Yes. And the majority of the practice acts had that
13 requirement in place.

14 Q Now, you told us earlier about Schedule II versus
15 Schedule III controlled substances. Is it true that you
16 wanted to have -- you, personally, wanted to have
17 hydrocodone reclassified from Schedule III to Schedule II?

18 A Yes, sir.

19 Q And that was something that you addressed by writing
20 letters in your official capacity to the FDA and the DEA?

21 A Yes, sir. The members of our association, the states,
22 passed a resolution directing us to take that position
23 because of the abuse they were seeing in their states with
24 that product.

25 Q And the reason you wanted it done in Schedule II

CATIZONE - CROSS

1 instead of Schedule III because that would change the
2 requirements for a prescription. Right?

3 A Yes, sir.

4 Q And that's because federal law requires a written
5 prescription for Schedule II controlled substances but not
6 for Schedule III controlled substances. Correct?

7 A It's a special prescription that must be written for
8 Schedule II. It's very different limitations than a
9 Schedule III.

10 Q Well, federal law says a Schedule III, you can
11 prescribe with an oral prescription. Right?

12 A Yes, sir.

13 Q So when you were talking earlier about -- the
14 prosecutor asked you about all the different requirements
15 for a prescription, and one was it has to be signed on the
16 same day that it's issued. Right?

17 A Yes, sir.

18 Q But a prescription could just be oral?

19 A If you're dealing with a written prescription, that's
20 the case. If it's an oral prescription, the doctor can call
21 it in. Two different requirements.

22 Q So you're saying that a written prescription for
23 Schedule III requires all of those things that you talked
24 about; a signature, it requires the patient address, all
25 kinds of correct patient information. It has to be signed

CATIZONE - CROSS

1 by the doctor in person on the same day it's issued. Right?

2 A Yes, sir.

3 Q If it's missing one of those requirements or two of
4 those requirements, you're saying that that is illegal?

5 A I don't think I ever testified to that.

6 But to answer your question, the prescription must be
7 complete. And if the information was missing, it would be
8 the pharmacist's responsibility to get that information
9 before they dispensed it.

10 Q Can a -- can someone from the doctor's office call a
11 pharmacy and call in a prescription at the doctor's
12 direction for a Schedule III controlled substances?

13 A Yes, sir.

14 Q And there's no requirement that the person making that
15 phone call from the doctor's office have any particular
16 medical training. Is that true?

17 A Yes, sir.

18 Q You testified earlier about the amounts of hydrocodone
19 or controlled substances that are considered normal for a
20 pharmacy to be issuing on a regular basis as a percentage of
21 their prescriptions. Right?

22 A Yes, sir.

23 Q Are you familiar with the fact that there are
24 particular clinics or hospitals that specialize in pain
25 management?

CATIZONE - CROSS

1 A Yes, sir.

2 Q Nationwide that's a fairly common situation. Right?

3 A Yes, sir.

4 Q Some can be very large, very sophisticated hospitals
5 with a wide array of services, some may be smaller, but
6 there are a variety of practices that specialize in pain
7 management. That's what they do.

8 A Yes, sir.

9 Q And some of those hospitals or clinics can have
10 dispensaries associated with them?

11 A I'm not sure what you mean by "dispensary," sir. Are
12 you referring to pharmacies?

13 Q Yes.

14 A Yes, sir.

15 Q They can either be a pharmacy that is physically
16 connected to the same practice or inhabit a space that's
17 next to it or even be part, owned by the same organization?

18 A Yes, sir.

19 Q Is that fair to say?

20 Would you agree with me if you had a pharmacy that was
21 physically connected to a pain management hospital, that it
22 would stand to reason that a large number of the
23 prescriptions being filled at that pharmacy would be pain
24 medication?

25 A If the other requirements were met by the state for

CATIZONE - CROSS

1 pain management that requires additional safeguards and
2 verifications that that pain management pharmacy was
3 involved in, then I would say yes. If those were absent,
4 then it would draw suspicion and that pharmacy would be
5 investigated.

6 Q I guess what I'm trying to get, your answer is: If
7 there's a pharmacy that's connected to a pain management
8 hospital, you're going to see a lot of pain medications
9 dispensed at that pharmacy. Correct?

10 A Yes, sir. Yes, sir.

11 Q That may be a much higher percentage than usual at an
12 average pharmacy. Right?

13 A Yes, sir.

14 Q It may, in fact, be the bulk of what they do?

15 A Yes, sir.

16 Q Now, let me ask you a quick hypothetical here.

17 Imagine that you are given a prescription to fill, and
18 you were aware the prescription had been filled out in the
19 following manner:

20 A patient had arrived at some sort of clinic; had
21 presented a nurse with a diagnosis, a piece of paper that
22 just had a diagnosis written on it, and a list of
23 medications that they were taking. And that piece of paper
24 had been signed by a nurse at a former doctor's office that
25 they had -- that they had been treated at.

CATIZONE - CROSS

1 And they presented that piece of paper to the nurse,
2 and the nurse looked at the list of medications, wrote out
3 prescriptions for the same medications, without any kind of
4 further interaction with the prior doctor, without looking
5 at any records or anything of that nature; signed the
6 doctor's name, and then their own name, and then called or
7 faxed that prescription in to the pharmacy.

8 Is that a prescription that you would willingly fill as
9 a pharmacist?

10 A No, sir.

11 Q And why not?

12 A I believe that that would violate the Medical Practice
13 Act because the nurse was engaged in the practice of
14 medicine and not simply acting as the doctor's agent. There
15 was no validation that that information the patient provided
16 actually came from a legitimate doctor. There was no
17 validation of that prescriber/patient relationship. And if
18 the pharmacy filled that, they would be filling a
19 prescription that was invalid.

20 Q Let me add one more fact to that hypothetical, if I
21 can.

22 That there is a doctor who is on staff at the clinic
23 but was not present for any of that interaction, who most of
24 the time is not present but comes in periodically to check
25 the work of that particular nurse, and could change the

CATIZONE - CROSS

1 prescription or change the course of treatment if the doctor
2 wanted to. Would that change your view of that?

3 A No, sir.

4 MR. ADOLF: Nothing further, Your Honor.

5 THE COURT: Mr. Foster.

6 MR. FOSTER: Thank you, Your Honor.

7 **CROSS EXAMINATION**

8 **BY MR. FOSTER**

9 Q Mr. Catizone, did you look at two different entities in
10 his case, Your Online Doctor and Woody's Pharmacy?

11 A Yes, sir.

12 Q So Woody's Pharmacy was a pharmacy. Correct?

13 A Yes, sir.

14 Q And Your Online Doctor was not. Correct?

15 A Yes, sir.

16 Q And your curriculum vita indicates that you've
17 testified four times in federal court previous to today?

18 A Yes, sir.

19 Q And that's always been for the prosecution. Correct?

20 A Yes, sir.

21 Q And your association is just that, it's an association;
22 it's not a government agency. Correct?

23 A Yes, sir.

24 MR. FOSTER: I have no further questions.

25 THE COURT: Any redirect?

CATIZONE - CROSS

1 MR. WASHINGTON: Nothing, Your Honor. Thank you.

2 THE COURT: You may step down and be excused.

3 Call your next witness.

4 MS. RIKARD: The United States recalls

5 Special Agent Raj west.

6 **RAJENDER WEST**

7 being duly sworn, was examined and testified as follows:

8 **DIRECT EXAMINATION**

9 **BY MS. RIKARD**

10 Q Okay. Good morning, sir.

11 Could you please remind us of your name and what you
12 do.

13 A Good morning. My name is Rajender J. West. My first
14 name is spelled R-A-J-E-N-D-E-R.

15 I'm employed as a criminal investigator for the
16 Internal Revenue Service.

17 Q And Agent West, have you been participating in the
18 investigation of Youronlinedoctor.com and Woody Pharmacy?

19 A Yes, I have.

20 Q And as part of that investigation, are you familiar
21 with the name, "Todd Strickland"?

22 A Yes, I am.

23 MS. RIKARD: Your Honor, at this time we move to
24 admit Government's Exhibit 31, 32 and 33. The authenticity
25 and admissibility have been stipulated to by defense

WEST - DIRECT

1 counsel.

2 THE COURT: Any objection?

3 MR. TATE: No objection.

4 MR. GSELL: No, Your Honor.

5 MR. FOSTER: No, Your Honor.

6 THE COURT: Let it be admitted. Let those
7 documents be admitted.

8 (Government's Exhibit No. 31, 32, 33 received.)

9 MS. RIKARD: Thank you, Your Honor.

10 May I approach with actually two pieces of
11 evidence are physical evidence?

12 THE COURT: You may.

13 **BY MS. RIKARD**

14 Q Agent West, do you recognize these items?

15 A Yes, I do.

16 Q Have you received these items in connection with your
17 investigation of Youronlinedoctor.com and Woody Pharmacy?

18 A I have reviewed these items.

19 Q If you would, please, describe for us now what
20 Government's Exhibit 31 is.

21 A Government's Exhibit 31 is a pill bottle from
22 Woody Pharmacy. The customer name is Todd Strickland.

23 Q And what was prescribed in that pill bottle?

24 A The quantity is 120. The drug is hydrocodone, with an
25 abbreviation for acetaminophen 10/500 milligram tablets.

WEST - DIRECT

1 Q Who was the doctor listed?

2 A The doctor listed is "Dr. Porfirio Orta," and it just
3 has "Rosa" on the end.

4 Q Which pharmacy did that pill bottle come from?

5 A Woody Pharmacy.

6 Q Agent, I'll ask Ms. Neill to put on your screen in
7 front of you what has been previously marked as Government's
8 Exhibit 9F.

9 Agent West, do you see a prescription number listed on
10 that pill bottle?

11 A Yes, I do.

12 Q What is that number?

13 A The number is 52456.

14 Q And do you see a prescription number on the screen in
15 front of you?

16 A I do.

17 Q What is that number?

18 A I actually see two. I see the one on top is 52456, and
19 the one on the bottom is 52457.

20 Q For the record, you have been looking at Government's
21 Exhibit 9F --

22 A Yes.

23 Q -- is that right?

24 A Correct.

25 MS. RIKARD: If you could please put up

WEST - DIRECT

1 Government's Exhibit 33 on the screen.

2 Q Agent West, let's take a look now at page 1 of
3 Government's Exhibit 33, and then page 2.

4 Do you do a Rx number listed on here?

5 A Yes, I do.

6 Q What is that number?

7 A 52456.

8 Q Agent West, I previously showed you what had been
9 marked as Government's Exhibit 32. Do you do your that?

10 A Yes, I do.

11 Q Is this a calendar?

12 A It is.

13 Q I'm going to show you a few pages from the calendar on
14 the Elmo, and it should appear on your screen.

15 Agent, what month and year is this?

16 A In the top left-hand corner of the calendar it says
17 "July 2005."

18 Q Directing your attention to July 7th, what do you see
19 written there?

20 A On July 7th here I see the word "Woody" with a
21 telephone number listed as "(704) 799-6697," and the words
22 of, the reference "0 refills."

23 Q Flipping to the next page, what month is this?

24 A This is August 2005 as indicated in the top left-hand
25 corner of the calendar.

WEST - DIRECT

1 Q And directing your attention to August the 5th, what do
2 you see there?

3 A I see the word "Woody" at the top. I see a telephone
4 number listed of "(704)799-6697."

5 Q Do you see two numbers listed below that?

6 A I do.

7 Q What are those numbers?

8 A "48762" and "48763".

9 Q What month is this?

10 A September 2005.

11 Q And directing your attention to September 23rd, what do
12 you see listed there?

13 A On the 23rd I see "Woody 23" and a number listed
14 underneath, "48762," and a telephone number listed of
15 "(704)799-6697," and below that there is the number "2".

16 Q That No. 48762, if you can keep that in your head
17 momentarily.

18 MS. RIKARD: And Ms. Neill, if we could look at
19 Government's Exhibit 9E, please.

20 Q Agent, you saw on the calendar 48762. Do you see that
21 number on Government's Exhibit 9E?

22 A I do. Right here (indicating) "48762" at the top.

23 MS. RIKARD: Thank you. Nothing further.

24 THE COURT: Mr. Gsell, any cross?

25 MR. GSELL: No, Your Honor. Thank you.

WEST - DIRECT

1 THE COURT: Mr. Tate?

2 MR. TATE: Yes. Briefly, Your Honor. If we could
3 have Ms. Neill bring up Government's Exhibit 9F.

4 CROSS EXAMINATION

5 BY MR. TATE

6 Q Agent West, you have been present in the courtroom
7 throughout this trial. Is that right?

8 A That's correct, sir.

9 Q And did your investigation reveal that this particular
10 prescription was handwritten, filled out, and faxed by
11 Stephen Giacobbe?

12 A Throughout the course of my investigation, I have
13 become familiar with Mr. Giacobbe's handwriting. And
14 neither the top portion with the customer information, nor
15 the bottom portion where the drugs are listed, resembles his
16 handwriting.

17 Q Do you recognize based on your investigation whose
18 handwriting that is?

19 A I couldn't say for certain, sir.

20 Q Well, do you know whether this prescription was an
21 original or was it a photocopy, particularly the signature
22 on the bottom of the document?

23 A Could I ask you to clarify your question a little bit,
24 sir?

25 Q Well, are you able to determine, based on your

WEST - CROSS

1 investigation, whether the signature for the doctor was an
2 original signature or was it a signature that had been
3 photocopied?

4 A The prescription that I reviewed during the course of
5 my investigation, the signature did not appear to be an
6 original signature, no, sir.

7 Q It appeared to be a photocopied?

8 A Yes, it did.

9 MR. TATE: No further questions.

10 THE COURT: Mr. Foster.

11 CROSS EXAMINATION

12 BY MR. FOSTER

13 Q Agent West, if you could pull up Exhibit 32, please.

14 MS. RIKARD: Mr. Foster, it's not in Sanctions.
15 We just have the hard copy.

16 MR. FOSTER: Turn to the page for July. Actually,
17 I can do this without you pulling it up. I'll just ask
18 questions. Thanks.

19 Q Agent West, you looked at the calendar?

20 A Yes, I did.

21 Q There's other notations on the calendar of different
22 dates for other online providers of pharmacy services.
23 Correct?

24 A That's correct.

25 Q Such as Medicom?

WEST - CROSS

1 A Yes, sir.

2 Q And Medipharma?

3 A Yes, sir.

4 Q And even that one said "refill Target" or something
5 like that?

6 A I think so, yes, sir.

7 Q So those, in your investigation, indicated that
8 throughout those months, July through December, there were
9 other pharmacies on that calendar along with Woody's.
10 Correct?

11 A There are other notations made on that calendar, yes,
12 sir. Absolutely.

13 MR. FOSTER: I have no further questions.

14 THE COURT: Any redirect?

15 MS. RIKARD: No, Your Honor. May we publish
16 Government's Exhibits 31 and 32 to the jury?

17 THE COURT: You may.

18 Agent West, you may step down.

19 May I see the lawyers at sidebar?

20 (Sidebar conference reported as follows:)

21 THE COURT: Do you have any witnesses?

22 MS. RIKARD: We do not.

23 THE COURT: Very well. Do you all -- how long
24 will the Rule 29 motions be?

25 MR. TATE: Five minutes. I'll make a motion and

WEST - CROSS

1 there's a lot of counts if we don't cover them in groups.

2 THE COURT: I think what we ought to do is take a
3 morning break after this publishing process is over and hear
4 from defense counsel. We'll see where we are at that point.

5 (Sidebar conference concluded.)

6 THE COURT: Does the government have any other
7 witnesses?

8 MS. RIKARD: No, Your Honor. The United States
9 rests.

10 THE COURT: Members of the jury, this is a good
11 time for our morning break. I know we've only been going at
12 it for a little over an hour, but we're going to take a
13 15-minute break at this time. Keep an open mind until you
14 hear all the evidence in the case. Don't talk about the
15 case during the break, and we'll see you at 11:30.

16 (Jury leaves courtroom at 11:17 a.m.)

17 THE COURT: I'd like to hear from any defendants
18 any motions at this time.

19 MR. GSELL: Thank you, Your Honor.

20 At this time on behalf of Ms. Giacobbe we would
21 make a motion under Rule 29 for judgment of acquittal as to
22 all counts.

23 The argument, Your Honor, is that this government
24 has failed to provide sufficient information from which a
25 jury could find beyond a reasonable doubt that Ms. Giacobbe

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1 violated the laws that she's charged with breaking.

2 It really boils down to a nutshell, Your Honor:
3 The government has failed to prove, one, the conspiracy that
4 Ms. Giacobbe and the other defendants entered into an
5 agreement to violate the federal law with regard to the
6 distribution of the prescriptions in this situation.

7 With regard to the substantive counts, Your Honor,
8 there's been no evidence that the prescriptions are
9 themselves invalid.

10 We heard testimony today that at the time with
11 which Ms. Giacobbe is charged with these matters, there was
12 not a requirement under federal law that there be a
13 face-to-face consultation. That law has only recently come
14 about, and she is not charged with any offenses from the
15 time the Haight law took effect.

16 In addition, Your Honor, we have heard testimony
17 with respect to prescriptions III substances, which in fact
18 she is charged with under the Bill of Indictment, those
19 prescriptions could, in fact, be called in, Your Honor; and
20 we heard testimony this morning those prescriptions could be
21 called in by a staff member with no medical training.

22 In essence, that's what the government is trying
23 to prove here, Your Honor, and as testified by their own
24 expert, that does not violate the law.

25 The government has simply failed to prove beyond a

1 reasonable doubt that what Ms. Giacobbe did is, in fact,
2 illegal under federal laws. Whether it's a violation of
3 state law, that's immaterial because she is not charged with
4 violating any state laws. As it stood at the time she
5 engaged in this conduct, the federal law simply did not
6 require a face-to-face consultation, and a prescription for
7 the nature of the substances that were being prescribed in
8 this manner simply could have been done orally on the
9 telephone.

10 So our position, Your Honor, is that the
11 government has not proved their case, each and every count,
12 with sufficient evidence to show beyond a reasonable doubt
13 that she is, in fact, guilty, and we would ask for a
14 judgment of acquittal as to all counts.

15 THE COURT: Mr. Tate.

16 MR. TATE: Thank you, Your Honor.

17 On behalf of Dr. Orta, we move for judgment of
18 acquittal on Count One.

19 Considering the evidence in this case viewed in
20 the light most favorable to the government, which I believe
21 is the standard, there's insufficient evidence that would
22 allow a reasonable jury to conclude beyond a reasonable
23 doubt that Mr. Orta had an agreement or partnership with the
24 other listed defendants to violate the Controlled Substances
25 Act; specifically 21 U.S.C. 841.

1 The evidence in this case, Your Honor, really is
2 that there's an agreement to exclude Dr. Orta from their
3 activities. There was plenty of witnesses that testified
4 that they, without his authorization, faxed his --
5 photocopies of his signatures, failed to consult with him
6 prior to doing that, as was outlined in their original
7 working agreement, which we maintained was lawful.

8 But to the extent it was unlawful, Dr. Orta was
9 not a part of that agreement. In fact, they excluded him to
10 his detriment.

11 There was e-mails about talking, not giving him
12 records, not letting him know this. There was testimony
13 from Stephen Giacobbe, Celeste Otiko, and others in this
14 trial that they did so without Dr. Orta's knowledge, and it
15 was a purposeful attempt to not tell him what was going on.
16 He was viewed -- I believe one witness, Mr. Giacobbe,
17 testified that it was true that they viewed that Dr. Orta
18 bogged down the process, therefore they sought to go around
19 him and issue these prescriptions unbeknownst to him, so he
20 could not possibly be in agreement with people working
21 against him.

22 Count Three through Six, we move for a judgment of
23 acquittal as a matter of law.

24 Those counts charge distribution of controlled
25 substances, prescription drugs, to Robin Bartlett. And I

1 believe again the evidence viewed in the light most
2 favorable to the government is that Dr. Orta had absolutely
3 nothing to do whatsoever with those prescriptions. They
4 were photocopied. Never talked to the patient. They were
5 faxed in unbeknownst to him.

6 The same argument would apply for the Count Seven
7 which involved a prescription for Ryan Kastner.

8 Now, moving on to Counts Eight through Nineteen,
9 all of these involve co-defendant Kathleen Giacobbe,
10 prescriptions to herself. And there's absolutely no
11 evidence, considered in the light most favorable to the
12 government, that Dr. Orta had anything whatsoever to do with
13 issuing those prescriptions. And I believe the evidence is
14 overwhelming that these were faxed, photocopies of
15 prescriptions he did not take part in and that were faxed in
16 unbeknownst to him. And there's no evidence to the
17 contrary.

18 So we'd move for judgment of acquittal on Counts
19 Eight through Nineteen.

20 And again Counts Twenty and Twenty-One,
21 prescriptions that Stephen Giacobbe, who testified here,
22 admitted that he did these two and many more prescriptions
23 without Dr. Orta's knowledge and on his own accord. He had
24 no role whatsoever in what Stephen Giacobbe did on his own.

25 Counts Twenty-Two through Twenty-Five involve a

1 woman by the name of Carol Hess. And again, as
2 Mr. Stephen Giacobbe testified and identified for the jury a
3 prescription that he said he filled out himself for Ms. Hess
4 and sent to him; and again a photocopy of Dr. Orta's
5 signature and there's no evidence suggesting he was
6 complicit in any way in, you know, filling out that
7 prescription.

8 The same would apply for Counts Twenty-Six through
9 Twenty-Nine also involving Carol Hess.

10 Counts Thirty through Thirty-Three again involve
11 Jeanette Becker. These are 2004 prescriptions, and I
12 believe it was Ms. Dudley who testified about these. And
13 again the evidence suggests she did this without consulting
14 Dr. Orta whatsoever. So I just don't see the link where any
15 evidence the government has put on that would link him to
16 the illegal conduct of Ms. Dudley.

17 Counts Thirty-Four through Thirty-Seven involve
18 David Peloff. Again, there's no evidence whatsoever, viewed
19 in the light most favorable to the government, that would
20 tie Dr. Orta to the issuance of those prescriptions. Our
21 position is that they were fraudulent; that it's part of the
22 agreement to exclude him. And, therefore, he cannot as a
23 matter of law be found guilty of those counts.

24 Counts Thirty-Eight through Forty-One involve 2005
25 prescriptions to a Kathy Labonte. Again, the evidence in

1 this case was that those were photocopied signatures of
2 Dr. Orta, and there's no evidence suggesting that he was
3 complicit in any way in the distribution of those
4 prescriptions. And, in fact, they were fraudulent use of
5 his signature.

6 Counts Forty-Two through Forty-Four involve Todd
7 Strickland. And again the evidence here is that employees
8 of YOD simply photocopied his signature unbeknownst to him
9 and issued these prescriptions without his knowledge. And
10 so there's been no logical link between their conduct and
11 anything that Dr. Orta did.

12 Counts Forty-Five through Forty-Seven again
13 involve Todd Strickland. The same argument applies there
14 for brevity, Your Honor.

15 Counts Forty-Eight through Fifty-One involve
16 Anna Parsons. And these are, again, 2004 prescriptions,
17 involving photocopied signatures of Dr. Orta. There's no
18 evidence whatsoever that he was consulted, knew about it,
19 agreed, passively, in any way to the conduct that was taken
20 by a YOD employee on their own.

21 Counts Fifty-Two and Fifty-Three involve Scott
22 Coletto who testified here. And again I think his testimony
23 was that he never spoke to Dr. Orta at all. And so the fact
24 that someone photocopied his signature, sent in a
25 prescription unbeknownst to Dr. Orta, in no way implicates

1 him in that otherwise would be illegal or fraudulent
2 conduct.

3 Counts Fifty-Four through Sixty-Three involves
4 Celeste Otiko. And she -- her testimony was unequivocal
5 that this involved -- okay. He's not charged in that.

6 THE COURT: Seventy-Seven is the next one that
7 Dr. Otiko --

8 MR. TATE: Yes. Seventy-Seven. These involve
9 prescriptions to Kathleen Giacobbe. We would incorporate by
10 reference the earlier arguments I made with respect to those
11 prescriptions written out to Kathleen Giacobbe.

12 THE COURT: Mr. Foster?

13 MR. TATE: Anna Parsons. Your Honor, again, I
14 think that there's also a factual gap in the government's
15 counts. There was no evidence adduced at trial those
16 prescriptions were ever actually delivered to Anna Parsons.
17 We would add that to our argument.

18 THE COURT: Very well.

19 MR. FOSTER: I move under Rule 29 for judgment of
20 acquittal on Count One, the conspiracy count. I would
21 maintain that there's no evidence from which a rational jury
22 could find beyond a reasonable doubt that my client ever
23 entered into an agreement with any of the named
24 co-conspirators or unnamed conspirators. No evidence that
25 he entered into any agreement with them to unlawfully

1 distribute drugs; to do so other than for legitimate medical
2 purpose and in the usual course of professional practice.

3 The evidence was my client was associated with YOD
4 up until March 2004. Most of the more illicit allegations
5 come thereafter. The evidence is clear that the business
6 model that was known to the participants in that time frame
7 was one where it was believed that Dr. Orta was actually
8 reviewing the medical records and approving the
9 prescriptions before they went out the door.

10 As far as Counts Twenty-Two through Twenty-Five
11 involving Carol Hess, I would submit there's insufficient
12 evidence that my client, number one, issued those
13 prescriptions, and number two, that it was not for a
14 legitimate medical purpose. She testified she was in pain.
15 She testified to the affliction she suffered from.

16 Counts Fifty-Four through Sixty-Three, these
17 involve Celeste Otiko, who also testified on the stand that
18 she did suffer from a variety of below-the-knee medical
19 problems that clearly would be in the scope of practice for
20 a podiatrist. Clearly she indicated she was in pain.

21 I would submit therefore that there's insufficient
22 evidence that these prescriptions were issued other than for
23 a legitimate medical purpose and in the usual course of
24 professional practice.

25 Counts Sixty-Four through Seventy-Three regarding

1 Tamara Hester, I would submit on these counts there's
2 insufficient evidence again to show that these
3 prescriptions, that all of them were called in by my client;
4 and insufficient evidence that any of them were other than
5 for a legitimate purpose in the usual course of professional
6 practice.

7 Regarding Counts Seventy-Four through Seventy-Six
8 regarding Richard Bradley, I submit there's evidentiary
9 failure there to prove that Richard Bradley was the
10 recipient of these Schedule III substances, or that they
11 were purposely set in any way, shape or form by my client
12 outside the scope of his practice.

13 So I would request that the Court grant the Rule
14 29 motion on all counts.

15 THE COURT: Thank you. What says the government?

16 MS. RIKARD: Thank you, Your Honor.

17 With regard to Ms. Giacobbe, the case law has
18 consistently held that a nonregistrant may still be
19 prosecuted in these types of prosecutions for either herself
20 distributing drugs unlawfully, or conspiring with
21 registrants to do so, or for aiding and abetting registrants
22 to do so.

23 The statistic that we have seen from Agent
24 Mueller, and from Agent West and June Howard, the experts,
25 the testimony from co-conspirators Libby Dudley, Stephen

1 Giacobbe and Celeste Otiko, all indicate this operation was
2 operating way outside the usual course of professional
3 practice. That it was simply a distribution center for
4 hydrocodone and a few other controlled substances. That
5 there was no involvement from an doctor whatsoever; that
6 that was not them elbowing him out as much as it was his
7 willing decision to remove himself from the process so that
8 presumably he couldn't be bothered and just receive his
9 weekly paycheck.

10 With regard to the substantive counts, we have had
11 testimony from co-conspirators Libby Dudley and Stephen
12 Giacobbe and Celeste Otiko identifying every person's
13 handwriting on those drug orders; that they were all
14 medically untrained and unauthorized, including the ones
15 written by Kathy Giacobbe.

16 With regard to the money laundering --

17 THE COURT: Before you get there, what about
18 Forty-Eight through Fifty-One with respect to Anna Parsons?

19 MS. RIKARD: Thank you, Your Honor.

20 First of all, we have testimony from Libby Dudley
21 and Stephen Giacobbe that Stephen Giacobbe was the one who
22 actually wrote that drug order for hydrocodone for
23 Ms. Parsons. Stephen Giacobbe testified that he, of course,
24 had no medical training. That he was simply a master's
25 student in a criminal justice program at the time, and does

1 not know how to write a prescription or especially how to
2 write a prescription for a controlled substance.

3 She was the witness that -- we intended call her
4 today but she still as pneumonia and could not travel.
5 However, we have been able to, through the computer
6 examiner, get in a copy of her questionnaire. We also have
7 put into evidence the UPS records indicating that drugs were
8 actually shipped to her. And we also have the testimony
9 from Jon Bentz, the pharmacist at Woody Pharmacy, who looked
10 at every single prescription charged in this case including
11 that of Anna Parsons, indicating that hydrocodone was
12 actually distributed to her.

13 THE COURT: And with respect to Count Seventy-Four
14 to Seventy-Six with Mr. Bradley.

15 MS. RIKARD: With regard to Mr. Bradley, the
16 testimony there is first of all from Dr. Meredith, that he
17 testified that simply the quantities alone and the frequency
18 with which they were prescribed is typically way outside a
19 podiatrist's scope of practice.

20 Ms. Hester also testified that to her knowledge
21 Richard Bradley was not receiving drugs from Chris Otiko or
22 Woody Pharmacy; that she was the only person receiving them.
23 That she would open up the box from Woody Pharmacy when it
24 arrived without necessarily looking at the addressee and
25 then consumed it from there.

1 Jon Bentz also looked at these prescriptions and
2 indicated they were called in by Chris Otiko. He could tell
3 they were a call-in prescription, and he testified he does
4 not recall ever receiving a call-in other than from Chris
5 Otiko. He does not recall any woman or anyone else
6 pretending to be Chris Otiko or someone working with him.
7 And the UPS records indicated that something was actually
8 shipped from the Woody's Pharmacy to Richard Bradley.

9 THE COURT: With respect to the money laundering
10 counts.

11 MS. RIKARD: Yes, Your Honor.

12 There we put into evidence the actual check
13 showing that was a financial transaction.

14 Agent West testified from the money traveled
15 between states and went from a bank in Vermont, Community
16 National, to a bank in North Carolina, BB&T.

17 On the checks themselves it wrote ship -- the memo
18 line read "shipping discount," indicating that it was
19 designed to -- that they were payments for the shipping
20 discounts. We saw evidence of the website advertising a
21 shipping discount, and we heard Libby Dudley testify that it
22 was simply to drum up business and to further and promote
23 the business of the website to get some more customers.

24 THE COURT: Thank you.

25 I'm required at this stage in the proceeding to

1 take the evidence in the light most favorable to the
2 government considering these Rule 29 motions. And doing so,
3 I find that there is sufficient evidence on each of the
4 counts to put this case before the jury. And so I would
5 deny each of the defendants' motions at this time.

6 I would like to discuss with defense counsel, each
7 one individually, whether they intend to put on evidence,
8 and to try to guesstimate the length of time remaining, the
9 defense evidence that might be put up.

10 MS. RIKARD: Your Honor, before you get there, I
11 apologize for interrupting but I did want to clarify one
12 thing.

13 The government is not actually proceeding on Count
14 Seven-Seven through Eight. Those were distributions coming
15 out of the Woody Pharmacy location in Denver, and we
16 elected, for brevity sake mostly and efficiency sake, to not
17 proceed on testimony there. Those were Kathy Giacobbe
18 distribution counts charging Alvin Woody and Dr. Orta.
19 Those are Counts Seventy-Seven through Eighty.

20 THE COURT: Seventy-Seven through Eighty are
21 counts that charge Dr. Orta.

22 MS. RIKARD: We will be moving to dismiss those
23 counts at this time. The earlier distributions to Kathy
24 Giacobbe, those are Counts Eight through Nineteen, we did
25 present evidence and do intend to proceed as planned.

1 THE COURT: Very well. I'll dismiss Counts
2 Seventy-Seven through Eighty.

3 MS. RIKARD: Thank you. And I'm sorry again for
4 interrupting.

5 THE COURT: Mr. Gsell, do you intend to put on
6 evidence?

7 MR. GSELL: Yes, Your Honor. There were two
8 agents that were originally on Mr. Adolf's list, Agent
9 Paquette and Agent Whitesell, and after conversation, I have
10 decided to call them as witnesses for Mr. Giacobbe. I would
11 anticipate probably no more than 20 minutes, 25 minutes for
12 the two of them.

13 THE COURT: Thank you.

14 Do you wish for me to examine your client with
15 respect to her constitutional right to testify or not to
16 testify?

17 MR. GSELL: Could I just have one moment, Your
18 Honor.

19 THE COURT: Sure.

20 (Mr. Gsell speaks with his client.)

21 MR. GSELL: Your Honor, at this time Ms. Giacobbe
22 does not wish to be advised by the Court.

23 THE COURT: Very well.

24 Mr. Gsell, for the record, have you explored,
25 without telling me anything about your conversation with

1 your client, but have you explored the options with your
2 client about the choice that she has to testify or not to
3 testify?

4 MR. GSELL: Yes, Your Honor. She is aware that is
5 her right under federal law, and she has chosen to exercise
6 the right not to testify on her own behalf in this matter.

7 THE COURT: Very well. Mr. Tate, do you
8 anticipate putting on evidence?

9 MR. TATE: Yes, Your Honor. Obviously we're going
10 to be calling an expert. We're going to be calling
11 Agent Hill. We're going to be calling a nurse, and Agent
12 Woods -- I keep calling her an agent -- I think she's an
13 employee of the FBI, not an agent. Ms. Woods. We
14 understand she is available.

15 As for Dr. Orta, we have not consulted with him
16 but he has not decided whether he will testify.

17 THE COURT: Very well. And I'm inclined to give
18 you, if you want, ten minutes to open before the
19 presentation of your evidence with respect to the forecast
20 of evidence. I wouldn't want any legal argument, but the
21 forecast of the evidence with respect to the affirmative
22 defenses that were alleged in your motion.

23 Do you wish to exercise that?

24 MR. TATE: Yes, Your Honor. Certainly, and
25 procedurally how I think that should play out is Mr. Gsell

1 would put on his witnesses. Mr. Adolf will call an expert
2 and another witness, and then prior to the witnesses that
3 are relevant to that defense I would do opening and call
4 them.

5 THE COURT: I think what I'll do, Mr. Tate, is
6 allow -- after Mr. Gsell puts on the defense case for
7 Ms. Giacobbe, I'll allow you a brief ten minutes to open on
8 the affirmative defenses.

9 MR. TATE: Okay.

10 THE COURT: And you mentioned that that is in
11 addition to any other evidence you're putting up that you
12 previously spoke about.

13 MR. TATE: Thank you, Your Honor.

14 THE COURT: I think we'll link that to ten
15 minutes.

16 I want to caution counsel there's a whole lot, in
17 my opinion argument, in the opening statements at the
18 beginning of the case. I don't want legal argument in
19 opening statement.

20 MR. TATE: Certainly.

21 THE COURT: And any guesstimate on the length of
22 time that your direct of these witnesses might take?

23 MR. TATE: I'm going to let Mr. Adolf address the
24 expert because --

25 MR. ADOLF: Judge, I would think for the expert it

1 would be half an hour or less. The other witnesses, the
2 nurse, ten minutes. And then there's the affirmative
3 defense that was discussed.

4 THE COURT: I'm not holding you to any estimates
5 but for planning purposes I'm trying to get a feel.

6 Mr. Foster, how about you?

7 MR. FOSTER: Your Honor, I intend to call two
8 witnesses that I've ascertained during the progress of the
9 trial; one is Stacy Rossi-Kollar, who is flying in from
10 California and not arriving until this evening. I initially
11 expected the government's case to last further into today
12 and my co-defendants' case to last through today.

13 And then I have another witness, Dan Dunlap, who
14 is going to be available -- the last time I spoke with
15 him -- would be 1:00 tomorrow afternoon. Try to get him
16 here in the morning if I can tomorrow.

17 I've advised my client at length about his choice
18 about whether he's going to testify or not, and he fully
19 understands everything. We continue to discuss that, Your
20 Honor.

21 MR. ADOLF: One more matter.

22 We had hoped -- Your Honor may recall from my
23 opening that there were a number of patient files, roughly
24 6,000 patient files, found on Dr. Orta's computer at home.

25 I was hoping to get that information in through

1 the DEA computer forensic person, who is going to be
2 testifying for the defense.

3 We have been in contact with her. I just got a
4 message back. I'm not sure that she's going to have time to
5 review that, depending on how the day goes. And if that's
6 the case, I may have to put on my computer forensics person
7 from my office just to establish basically a chain of
8 custody of the patient records, just where they were found
9 and how many there are.

10 THE COURT: Have you explored a stipulation on
11 this?

12 MR. ADOLF: I have not, Judge.

13 THE COURT: Why don't you do that at some time
14 before we come back this afternoon.

15 MR. ADOLF: Very good.

16 THE COURT: It might just help.

17 All right. Well, let me -- anything else before
18 we call the jury back?

19 MR. WASHINGTON: Judge, might we be allowed to
20 have a short break just to use the restroom?

21 MR. GSELL: I concur.

22 THE COURT: We have agreement on an issue in this
23 case among counsel, we can defer to that. So we'll take
24 another ten minutes and be ready for the jury at five to
25 12:00.

1 (Recess taken.)

2 THE COURT: Are you ready for the jury?

3 MR. GSELL: Thank you, Your Honor.

4 THE COURT: All right. Call the jury.

5 (Jury enters courtroom at 11:57 a.m.)

6 THE COURT: Mr. Gsell.

7 MR. GSELL: At this time Mr. Giacobbe would call
8 Aprile Whitesell.

9 **APRILE WHITESELL**

10 being duly sworn, was examined and testified as follows:

11 **DIRECT EXAMINATION**

12 **BY MR. GSELL**

13 Q Good morning, ma'am. Can you state your name for the
14 record.

15 A Aprile Whitesell.

16 Q Ms. Whitesell, my name is Scott Gsell. I represent
17 Kathy Giacobbe. She was the owner of Your Online Doctor.
18 How are you currently employed?

19 A I'm currently employed with the Drug Enforcement
20 Administration.

21 THE COURT: Can you bend that microphone closer?
22 Thank you.

23 Q Just so that everybody can hear that, can you please
24 state how your currently employed?

25 A I work with the Drug Enforcement Administration.

WHITESELL - DIRECT

1 Q What do you do for the DEA?

2 A I am a diversion investigator.

3 Q Can you tell the jury what a diversion investigator
4 does?

5 A I handle regulatory investigations approving
6 individuals for licensure who handle controlled substances,
7 and also do criminal work on those individuals also.

8 Q Okay. And were you so employed back in February of
9 2006?

10 A Yes, sir.

11 Q Okay. And are you familiar with Your Online Doctor?

12 A Yes.

13 Q And how are you familiar with Your Online Doctor?

14 A I conducted, I guess, an undercover sale; tried to
15 purchase controlled substances from them during that time.

16 Q Okay. And in fact, didn't you access their website?

17 A Yes, I did.

18 Q Okay. And you, in fact -- well, did you print out the
19 questionnaire?

20 A Yes.

21 Q Did you fill it out?

22 A Yes, I did.

23 Q And did you use your real name?

24 A No.

25 Q Did you use a fake name?

WHITESELL - DIRECT

1 A Yes.

2 Q Okay. And do you recall what you wrote down as far as
3 what your previous medications were?

4 A No, sir, I don't recall.

5 Q Okay. If I showed you that questionnaire, would that
6 help you refresh your recollection?

7 A Yes.

8 MR. GSELL: May I approach the witness, Your
9 Honor?

10 THE COURT: You may.

11 Q There are multiple pages. I'll ask you to take a look
12 at that, read it over, and let me know when you're finished
13 with that.

14 THE COURT: Just for identification purposes, can
15 we give that a Giacobbe number?

16 MR. GSELL: Yes. We'll give that Defendant
17 Giacobbe 1.

18 THE COURT: Thank you.

19 THE WITNESS: (Witness complies.)

20 The only thing I need to make a correction on in
21 this is that --

22 THE COURT: Ma'am, the question from the attorney
23 was: Does that refresh your recollection?

24 THE WITNESS: Yes.

25 BY MR. GSELL

WHITESELL - DIRECT

- 1 Q Okay. So you recognize that document?
- 2 A I recognize the document.
- 3 Q And what is that document?
- 4 A This is the document that we pulled off of the online
5 pharmacy.
- 6 Q Is that the document that you submitted?
- 7 A Yes, it is the document that was submitted.
- 8 Q By reviewing that, it has refreshed your recollection?
9 You now recognize that document?
- 10 A Yes.
- 11 Q Now, I direct your attention to the face page of it.
12 About one-third of the way down it says "date of last
13 examination." Do you see that?
- 14 A On the first page?
- 15 Q Yes.
- 16 A Yes.
- 17 Q And can you tell the jury what date is placed in this?
- 18 A I believe it says "January 2001."
- 19 Q Okay. And you submitted this questionnaire in February
20 of 2006?
- 21 A Correct.
- 22 Q Okay. And right next to that it says "reason for
23 examination." Do you see that?
- 24 A Yes.
- 25 Q What did you put down?

WHITESELL - DIRECT

- 1 A "Flu."
- 2 Q And the next line down it says "previous medications."
- 3 A Uh-huh.
- 4 Q What did you put in there?
- 5 A "Hydrocodone."
- 6 Q And next to that it says "current medications."
- 7 Correct?
- 8 A Correct.
- 9 Q And what did you put down?
- 10 A "None.""
- 11 Q Okay. And directly below "current medication," it says
- 12 "What medications are you requesting and why." Correct?
- 13 A Yes.
- 14 Q And what did you put down?
- 15 A Just hydrocodone.
- 16 Q Okay. Now, I'm going to direct your attention to the
- 17 bottom third of that face page. Do you see the box where it
- 18 says, "What is your past surgical history?"
- 19 A Yes.
- 20 Q And what did you put in there?
- 21 A "None."
- 22 Q And to the right of that it says "previous occasion
- 23 when you were hospitalized." Do you see that?
- 24 A Yes.
- 25 Q And what did you put in there?

WHITESELL - DIRECT

- 1 A "None."
- 2 Q Okay. And the next line down it says, "Do you consider
3 yourself to be in good health?" Correct?
- 4 A Correct.
- 5 Q What did you put down?
- 6 A "Yes.""
- 7 Q To the right of that it says, "Explain."
- 8 A Correct.
- 9 Q What did you put in?
- 10 A "I feel pretty healthy."
- 11 Q You accessed the website and printed this out. Is that
12 correct?
- 13 A Correct.
- 14 Q Okay. And then you filled it out. Is that correct?
- 15 A I did not personally fill it out.
- 16 Q Okay. Who did fill it out?
- 17 A DI Gary Linder filled it out.
- 18 Q Okay. And after it was filled out, what did you do
19 with that questionnaire?
- 20 A We faxed it back to the company.
- 21 Q Faxed it back to?
- 22 A The online -- the fax where they gave us to fax it back
23 to Your Online Doctor.
- 24 Q Okay. Did you submit any medical records with that
25 questionnaire?

WHITESELL - DIRECT

1 A I don't recall.

2 Q Okay. Do you recall whether or not you submitted a fee
3 along with the questionnaire?

4 A We did not. As far as I remember, we did not submit a
5 fee at that time.

6 Q Okay. And did you ever -- did you ever hear back from
7 Your Online Doctor after you submitted that questionnaire?

8 A No.

9 Q So you never received hydrocodone from
10 Your Online Doctor?

11 A No, sir.

12 Q Did Your Online Doctor ever tell you why you weren't
13 receiving the hydrocodone as requested?

14 A No.

15 Q Was this your only attempt at -- well, strike that.
16 Was this the only time you submitted a questionnaire to
17 Your Online Doctor during your investigation?

18 A We made another attempt. I'm not sure if we submitted
19 a questionnaire at that time.

20 Q Did you, in fact, make another attempt?

21 A No.

22 Q Somebody else in the DEA?

23 A Another DI and I worked together on it.

24 MR. GSELL: Okay. I have no further questions.

25 Thank you, ma'am.

WHITESELL - DIRECT

1 THE COURT: Any cross?

2 CROSS EXAMINATION

3 BY MR. WASHINGTON

4 Q Good afternoon.

5 So you submitted incomplete documentation to the
6 Your Online Doctor website?

7 A Yes. Well, whatever was completed on this, that's what
8 we submitted.

9 Q But you didn't include some things?

10 A We -- I think we left off the last page, inadvertently
11 left it off, and then we later tried to fax it back to them.

12 Q Okay. Your request was -- didn't have the last page of
13 the questionnaire on it?

14 A Correct.

15 Q Didn't have any medical records that you recall?

16 A That I recall. Yes, sir.

17 Q And didn't have any ID that you recall?

18 A Correct.

19 Q And so isn't it true, ma'am, that it's not that you
20 were turned down, you just never heard back from them?

21 A Correct.

22 Q So you don't know if they ever even received your
23 packet, do you?

24 A No, I don't.

25 MR. WASHINGTON: No further questions.

WHITESELL - CROSS

1 THE COURT: Any redirect?

2 MR. GSELL: Briefly, Your Honor.

3 **REDIRECT EXAMINATION**

4 **BY MR. GSELL**

5 Q To the best of your knowledge, ma'am, that
6 questionnaire was -- well, how did you return that document
7 to Your Online Doctor?

8 A I faxed it to them.

9 Q To the best of your knowledge, you dialed in the
10 correct fax number?

11 A To the best of my knowledge, yes.

12 MR. GSELL: Nothing further, Your Honor. Thank
13 you.

14 THE COURT: You may step down and be excused.

15 If you would hand that document back to Mr. Gsell
16 on your way out.

17 Call your next witness.

18 MR. GSELL: Thank you, Your Honor. At this time
19 we would call Christopher Paquette.

20 **CHRISTOPHER PAQUETTE**

21 being duly sworn, was examined and testified as follows:

22 **DIRECT EXAMINATION**

23 **BY MR. GSELL**

24 Q Good morning, sir. Can you please state your name.

25 A Christopher Paquette.

PAQUETTE - DIRECT

1 Q Paquette?

2 A Paquette.

3 Q My name is Scott Gsell. I represent Kathy Giacobbe.
4 She used to own Your Online Doctor. I do want to ask you
5 some questions today.

6 How are you presently employed?

7 A I'm employed as a diversion investigator with the
8 United States Department of Justice, Drug Enforcement
9 Administration.

10 Q Okay. Were you so employed back an April 2006?

11 A Yes, I was.

12 Q Are you familiar with the company named
13 Your Online Doctor?

14 A Yes, I am.

15 Q And how are you familiar with Your Online Doctor?

16 A Your Online Doctor was a business, a target of an
17 investigation of multiple DEA and FBI offices.

18 Q Okay. And were you personally involved in the
19 investigation of Your Online Doctor?

20 A Yes, I was.

21 Q Now, I'll take you back to April of 2006. Did you have
22 the opportunity to visit the Your Online Doctor website?

23 A I did.

24 Q Okay. And did you access the questionnaire?

25 A Yes, I did.

PAQUETTE - DIRECT

- 1 Q And did you print that out?
- 2 A I did.
- 3 Q Okay. And did you fill out the questionnaire?
- 4 A Yes, I did.
- 5 Q Okay. And what was the purpose of filling out the
- 6 questionnaire?
- 7 A To attempt to obtain controlled substances from the
- 8 website.
- 9 Q Okay. Did you use your real name?
- 10 A I did not.
- 11 Q Okay. Whose name did you use?
- 12 A An assumed identity, an undercover identity.
- 13 Q Okay. And that's the name you put on the
- 14 questionnaire?
- 15 A Correct.
- 16 Q Okay. And after filling out the questionnaire, did you
- 17 submit the questionnaire to Your Online Doctor?
- 18 A Yes, I did.
- 19 Q Did you submit any other documentation along with the
- 20 questionnaire?
- 21 A I did.
- 22 Q And what else did you submit?
- 23 A I submitted medical records.
- 24 Q Okay. Were they your medical records?
- 25 A They were not.

PAQUETTE - DIRECT

1 Q Okay. Do you know whose medical records they were?

2 A I don't know whose medical records they were.

3 Q Do you know what type of medical record they were?

4 A I don't.

5 Q So you don't know if they were doctor records?

6 A I don't know.

7 Q You wouldn't know if they were dental records?

8 A I don't know.

9 Q Okay. Did you submit identification at that time?

10 A Yes, I did.

11 Q And whose identification did you submit?

12 A A Connecticut driver's license and undercover assumed

13 name.

14 Q And the name on that driver's license matched the name

15 on the questionnaire. Correct?

16 A Correct.

17 Q Okay. And did you send in the fee?

18 A Yes, I did.

19 Q Do you recall how much the fee was?

20 A I don't.

21 Q Okay. And do you recall how you sent in the fee? Was

22 it credit card or money order?

23 A I believe it was a bank check.

24 Q Okay. Now, as a diversion investigator, you're not

25 allowed to just write checks for investigations. Correct?

PAQUETTE - DIRECT

1 A That's correct.

2 Q Okay. You have to get approval for that?

3 A Yes.

4 Q And did you get approval to get the check in this case?

5 A Yes.

6 Q Okay. Now, on the questionnaire, you did not use your
7 correct address. Right?

8 A No.

9 Q Okay. Do you recall what address you used?

10 A An undercover post office box in the city of Hartford,
11 Connecticut.

12 Q Okay. And is that a post office box you had to rent
13 because of this investigation?

14 A Not specific to this investigation, no.

15 Q Okay. Is it just a post office box that you used for a
16 number of other investigations?

17 A Yes.

18 Q And did you tell your supervisors what you were doing
19 as far as putting that address down on the questionnaire?

20 A Yes, sir.

21 Q Okay. So is it fair to say that the people above you
22 knew exactly what you were doing?

23 A Yes.

24 Q Okay. Now, before coming into court today to testify,
25 did you review any documents or anything?

PAQUETTE - DIRECT

1 A Well --

2 Q Within the last week did you review any documents
3 pertaining to this case?

4 A I briefly read over some investigative reports.

5 Q Okay. Do you recall which investigative reports you
6 reviewed?

7 A There was one for an undercover telephone call placed
8 to Your Online Doctor; Report of Investigation of an
9 undercover telephone call placed to Woody Pharmacy.

10 Q Okay.

11 A And a Report of Investigation of the undercover -- the
12 attempted undercover purchase.

13 Q Okay. When you say "attempt," what do you mean?

14 A The undercover purchase was not successful.

15 Q Okay. And do you recall why it was not successful?

16 A Some e-mails were exchanged between Your Online Doctor
17 and my undercover e-mail address indicating that they did
18 not treat the condition which I had put down on the
19 questionnaire.

20 Q Do you recall what condition you put down on the
21 questionnaire?

22 A I believe it was chronic cough.

23 Q And you say Your Online Doctor -- well, you submitted
24 the questionnaire. Correct?

25 A Correct.

PAQUETTE - DIRECT

1 Q And along with all the appropriate documentation?

2 A Yes.

3 Q And did you hear back from Your Online Doctor shortly
4 after you had submitted the questionnaire?

5 A No.

6 Q Okay. After not hearing from them, did you attempt to
7 make contact with them?

8 A Yes.

9 Q And how did you attempt to do that?

10 A By telephone.

11 Q Okay.

12 A Or excuse me -- strike that. Possibly e-mail.

13 Q Okay. And did you get a response back to that contact
14 at Your Online Doctor?

15 A I did, via e-mail, yes.

16 Q And what was that e-mail again? Do you recall what you
17 were told by Your Online Doctor?

18 A Verbatim, no. However, essentially something companion
19 to the effect of, "We don't treat your condition, therefore,
20 we'll -- we'd like an address to be able to send your check
21 back."

22 Q Okay. And did you, in fact, get that check back?

23 A Yes, I did.

24 Q Okay. Other than that attempt in April of 2006, did
25 you personally make any other attempts to obtain

PAQUETTE - DIRECT

1 prescriptions through Your Online Doctor?

2 A No.

3 Q Okay.

4 MR. GSELL: I have no further questions, Your
5 Honor. thank you.

6 THE COURT: Any cross?

7 MS. RIKARD: Yes, sir.

8 **CROSS EXAMINATION**

9 **BY MS. RIKARD**

10 Q Mr. Paquette, you participated in the investigation of
11 Your Online Doctor and Woody Pharmacy. Correct?

12 A I did.

13 Q And at some point in your investigation you came to
14 realize, or you came to learn that they were responsible for
15 the distribution of hydrocodone pills. Correct?

16 A Correct.

17 Q But that's not what you were requesting. Correct?

18 A Correct.

19 Q You were asking for hydrocodone syrup. Right?

20 A Correct.

21 Q Which they didn't provide. Right?

22 A Correct.

23 MS. RIKARD: Nothing further.

24 THE COURT: Redirect?

25 MR. GSELL: Briefly, Your Honor.

PAQUETTE - CROSS

REDIRECT EXAMINATION

BY MR. GSELL

Q On the questionnaire you submitted, did you list any other complaints other than chronic cough?

A Without reviewing the questionnaire, I do not recall.

Q Do you recall indicating on the form that the cough led to back pain?

A I don't specifically recall on the form, but I believe I did indicate that in my -- in an e-mail to Your Online Doctor.

Q Okay. And even with that additional complaint, Your Online Doctor did not provide you with a prescription. Correct?

A No, they did not.

MR. GSELL: Okay. Nothing further, Your Honor. Thank you.

THE COURT: You may step down and be excused.

MR. GSELL: Nothing further at this time.

THE COURT: Mr. Adolf, Mr. Tate.

MR. TATE: Your Honor, may we approach at sidebar?

THE COURT: Yeah.

(Sidebar conference reported as follows:)

MR. TATE: I can do the opening statement, but there are -- our first witness is being picked up from the airport right now. If the Court wanted to break for lunch,

PAQUETTE - CROSS

1 we can to that. Just break now and do it when we --

2 THE COURT: Why don't we get as much in as we can
3 because I planned this around this time frame. Go ahead do
4 your opening statement, and then we'll take a break at that
5 point for lunch.

6 MR. TATE: All right. Thank you.

7 (Sidebar conference concluded.)

8 THE COURT: Members of the jury, before
9 presentation of Dr. Orta-Rosario's defense, Mr. Tate is
10 going to make a brief opening statement to you about the
11 certain affirmative defenses, and then we're going to break
12 for lunch before we hear any additional witnesses. So if
13 you would give Mr. Tate your attention at this time.

14 MR. TATE: Thank you, Your Honor.

15 May it please the Court. Counsel. Ladies and
16 gentlemen of the jury. I'm Kevin Tate. I'm co-counsel for
17 Dr. Orta.

18 I want to talk to you a bit about the forecast I
19 would say of what I think the evidence will show after we
20 put on our case, and after considering this evidence, I
21 believe you'll render the only proper verdict, which is not
22 guilty.

23 The evidence will show that beginning in 2003, you
24 may have heard some of this, Dr. Orta took on a position as
25 a consulting physician with Your Online Doctor. This was a

1 new business model involving the Internet. His job was to
2 consult with this company reviewing medical records, and
3 give them advice on whether this person was eligible for a
4 prescription.

5 What you will hear is that at some point
6 Dr. Orta's pursuit to document, deny or reject patients, was
7 bogging down this business. And you may have heard some of
8 that from the evidence already.

9 And what happened in turn was that they went
10 around Dr. Orta and started using his signature,
11 misappropriating it, making prescriptions to themselves and
12 others bearing his signature without consulting him. The
13 evidence will show without a fact unequivocally that this
14 was without his knowledge. And if he doesn't have this
15 knowledge of it, he can't be held guilty of that.

16 Following that, you'll learn that there was a
17 confidential informant unbeknownst to Dr. Orta, this woman,
18 who had been a long-time friend, was also a confidential
19 informant for the DEA. He did not know that.

20 And during his consultations with this person he
21 basically relied on them, told them what it was that he was
22 doing. And sooner or later he got in touch with a DEA
23 Diversion Investigator Tom Hill. I'm calling him to the
24 stand. You'll hear from him.

25 And Mr. Hill suspended Dr. Orta's certification,

1 his DEA certification that you saw so much about. And I
2 believe I'm going to get the date right, it was around
3 July 23rd, 2003. Suspended. He could no longer do
4 business; cannot write prescriptions.

5 And the rouse that the investigator gave him for
6 suspending his certificate was that he had moved from
7 Wisconsin to Michigan, and that his new address had not yet
8 been registered so it had to be suspended.

9 And Investigator Hill requested that Dr. Orta send
10 to him personally his renewal certification. As part of
11 that process he also went out and personally met with
12 Dr. Orta at his residence in Wisconsin, and they discussed
13 his ongoing relationship with YOD; what he had been doing,
14 what he planned to do in the future.

15 What he told them was exactly as it was outlined
16 in this case. He told them that he provided consulting
17 services to YOD. That the providers, or the patients that
18 would call in would provide their medical records. He would
19 be contacted by telephone. And you'll see some of the
20 e-mails where he's rejecting these people and he would say
21 yeah, this is legitimate medical thing or no, it's not, and
22 you can issue a prescription.

23 You'll hear from a expert by the name of Dr.
24 Bloom -- and he'll tell you at the time, in the time frame
25 of this indictment it was very unclear, if you haven't got

1 that already, about what the law was, at least in terms of
2 federal law -- and whether this new entrepreneur process of
3 delivering prescription medications and medical services
4 over the Internet was lawful. It was very ambiguous.

5 As part of that Dr. Orta consulted in both the
6 confidential source and with the Diversion Investigator
7 Hill. He told him that he was doing this over the Internet.
8 That he worked from his home. That he saw no patients in
9 his home. He had no patient contact whatsoever. That he
10 merely consulted on the phone and talked to them and
11 reviewed their medical records. He told them that if they
12 didn't have medical records, if they hadn't been previously
13 prescribed the drug, that they would not get it. He said
14 that they were required to have a legitimate medical
15 condition, and that this was ongoing treatment.

16 He told them importantly, because you have heard
17 something about whether prescriptions are required, that he
18 only issued Schedule III, IV and V, which, as you heard,
19 only requires -- can even be an oral prescription, didn't
20 require a written prescription -- he did not do Schedule II
21 drugs. Hydrocodone, if you recall the list, is Schedule
22 III.

23 He told them that, "I don't do Schedule II because
24 I believe it to be illegal. As far as I understand it, with
25 this business model I can do Schedule III, IV and V, and we

1 don't do Schedule II drugs."

2 Now, what he didn't know, what you'll learn is
3 that the CI was also talking to Kathy Giacobbe. And she
4 learned through conversations with her and Dr. Orta that the
5 pharmacist -- pharmacies would not honor any Orta
6 prescriptions because there wasn't a current and valid DEA
7 certification, and she was going to fire him. She was going
8 to find another doctor that did have so that business could
9 go on.

10 What Agent Hill did at that point was he went into
11 the system and took the hold off his license, and approved
12 it after knowing everything that Dr. Orta said that he was
13 doing, that the government is now saying is illegal, and
14 approved him. And Dr. Orta relied on that, and believed
15 that the operation certainly was valid, otherwise they
16 wouldn't have given him a certificate to go on an issue
17 prescriptions for the next two years. As we learned he
18 didn't know it was being photocopied.

19 But, importantly, at the end of the case when
20 we're done presenting our case, I believe you'll be
21 instructed that as a matter of law you must acquit him on a
22 doctrine called entrapment by estoppel. Meaning that the
23 government can't approve you doing something and then later
24 come back --

25 MR. WASHINGTON: Objection. Argumentative.

1 THE COURT: Sustained.

2 MR. TATE: You'll hear the evidence at the end of
3 the case. I believe when you listen to our case and you
4 hear the evidence and the Judge instructs you on the law
5 there's only one verdict you can come to as to Dr. Orta:
6 Not guilty.

7 THE COURT: We'll take our lunchtime break. And I
8 would ask you to be back in the jury deliberation room at
9 1:20 ready to come back into court at 1:30.

10 (Jury leaves courtroom at 12:16 p.m. and recess
11 taken.)

12 - - - - -

13 **UNITED STATES DISTRICT COURT**
14 **WESTERN DISTRICT OF NORTH CAROLINA**

15 **CERTIFICATE OF REPORTER**

16 I, JOY KELLY, RPR, CRR, certify that the foregoing
17 is a correct transcript from the record of proceedings in
18 the above-entitled matter.

18

19

20 S/JOY KELLY

21 **JOY KELLY, RPR, CRR**
22 **U.S. Official Court Reporter**
Charlotte, North Carolina

Date _____

23

24

25